

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

HENRY ROSENAU

Defendant.

No. CR06-157MJP

MOTION TO SUPPRESS

Noted on Motion Calendar:  
September 16, 2011

The defendant, through undersigned counsel, moves this Court to suppress all evidence and statements obtained as a result of an unlawful search and seizure. This motion is based on the Fourth and Fifth Amendments to the United States Constitution, the defense brief in support of this motion, and any evidence which may be adduced at a hearing on this motion.

**FACTS AND DECLARATION OF COUNSEL**

I swear under penalty of perjury that the following is true to the best of my knowledge based on information and belief:

1. I am the counsel of record for the above-named defendant.
2. The above matter arose out of a joint investigation by agents of the United States Bureau of Immigration and Customs Enforcement (ICE) and the Royal Canadian Mounted Police (RCMP).

- 1 3. Law enforcement personnel on both sides of the Canada/United States Border were  
2  
3 actively engaged in a joint operation.  
4
- 5 4. This joint investigation was a part of a larger joint venture known as "Operation Frozen  
6  
7 Timber."  
8
- 9 5. Jesse Miller, special agent with ICE, testified that the RCMP was a very important part of  
10  
11 the ICE investigation and that without the RCMP, ICE would have faced hardship.  
12  
13 Transcript of Grand Jury Proceedings, Testimony of Jesse Miller, 13.  
14
- 15 6. Miller further testified that the RCMP does a "really good job in regards to gathering  
16  
17 facts to help us with our cases down here." *Id.*  
18
- 19 7. Special Agent Miller also confirmed in his testimony that the RCMP leaves law  
20  
21 enforcement and prosecution to the United States. *Id.*  
22
- 23 8. On September 21, 2005, ICE agents in the United States witnessed a helicopter flying  
24  
25 north toward the Canadian Border.  
26
- 27 9. Thereafter ICE contacted RCMP and/or the Integrated Border Enforcement Team.  
28
- 29 10. The Integrated Border Enforcement Team is a joint investigation team composed of law  
30  
31 enforcement personnel from both Canada and the United States.  
32
- 33 11. ICE had the RCMP personnel travel to certain properties located in Yale, Canada.  
34
- 35 12. These properties were owned by Glen Stewart, but Mr. Rosenau was currently leasing the  
36  
37 premises, had occupational rights, and had an option to purchase the property.  
38
- 39 13. RCMP entered the property after driving past a gate with a large sign that reads "private  
40  
41 property."  
42
- 43 14. After driving about a half mile past the gate, RCMP made contact with Mr. Rosenau.  
44  
45  
46

- 1 15. RCMP agents detained Mr. Rosenau and required him to remain at a Suburban vehicle  
2  
3 for approximately one hour.  
4  
5 16. RCMP, Constable Kachur, claims he read Mr. Roseanu his "rights."  
6  
7 17. RCMP never read Mr. Rosenau his *Miranda* rights.  
8  
9 18. RCMP then interrogated Mr. Rosenau and asked Mr. Rosenau questions including  
10  
11 whether Mr. Rosenau knew the names of certain individuals, whether Mr. Rosenau had  
12  
13 been a flying a helicopter earlier that day, and where such flying may have occurred.  
14  
15 19. Mr. Rosenau allegedly made several statements while being interrogated.  
16  
17 20. RCMP officials then conducted a warrantless search of a helicopter allegedly owned by Mr.  
18  
19 Rosenau without his consent.  
20  
21 21. RCMP opened and prowled through a gym bag found in the helicopter without consent.  
22  
23 22. RCMP officials laid out items on the ground seized from the helicopter. RCMP discovered  
24  
25 Satellite Phones, a GPS device, on which they then viewed programmed coordinates, a  
26  
27 firearm and gathered other items and information.  
28  
29 23. RCMP also took keys from Mr. Rosenau's pocket and a Blackberry from his person.  
30  
31 24. RCMP also conducted a search of a shop building without a warrant or consent.  
32  
33 25. RCMP then told Rosenau he was free to leave, but also stated that Mr. Rosenau was going  
34  
35 to die as an old man in an American jail.

36 DATED this 6<sup>th</sup> day of September, 2011.  
37

38 Respectfully submitted,  
39 PLATT & BUESCHER  
40

41  
42 s/Craig Platt  
43 Craig Platt  
44 Attorney for Defendant  
45 WSBA #12396  
46

## INTRODUCTION

On September 21, 2005, United States and Canadian authorities were engaged in a joint venture. As a result Fourth Amendment protections were implicated and Fifth Amendment protections applied. The RCMP engaged in an unlawful search and seizure during this joint venture. Moreover, the RCMP failed to advise Mr. Rosenau of his *Miranda* rights before a custodial interrogation. As a result all fruits of this unlawful search and seizure and all statements made by Mr. Rosenau must be suppressed.

## LAW AND ARGUMENT

Prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment, it was important to determine whether Federal officials substantially participated in raids conducted by State officials. This was because a “joint venture” would subject State actors to the requirements of the Fourth Amendment. *Stonehill v. U.S.*, 405 F.2d 738, 743 (9th Cir. 1968). This inquiry remains pertinent in order to determine whether Fourth and Fifth Amendment protections apply with respect to foreign law enforcement. *See United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987)(joint venture search implicated Fourth Amendment); *U.S. v. Emery*, 591 F.2d 1266 (9th Cir. 1978)(statements suppressed where Mexican authorities engaged in joint venture with United States failed to give *Miranda* warnings).

### **I. JOINT VENTURE AND FOURTH AMENDMENT PROTECTION**

In general, neither the Fourth Amendment nor the judicially created exclusionary rule applies to acts of foreign officials. *United States v. LaChapelle*, 869 F.2d 488, 489 (9th Cir.1989), *quoting United States v. Maher*, 645 F.2d 780, 782 (9th Cir.1981). However, an exception to the inapplicability of the exclusionary rule applies when “United States agents’ participation in the investigation is so substantial that the action is a joint venture between United

1 States and foreign officials.” *U.S. v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995). To invoke the  
 2  
 3 “joint venture doctrine,” it must be determined whether the analysis contained in *United States v.*  
 4  
 5 *Verdugo-Urquidez* applies, the defendant must show that the United States and foreign officials  
 6  
 7 were engaged in a joint venture, a violation of foreign law occurred made the search  
 8  
 9 unreasonable, and the United States did not rely in good faith upon the foreign officials’  
 10  
 11 representations that their law was being complied with. *See Barona*, 56 F.3d at 1093.

12  
 13 a. ***Verdugo-Urquidez***

14 In *Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment does not  
 15  
 16 apply to search and seizures by United States agents of property that is owned by a nonresident  
 17  
 18 alien and located in a foreign country. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261, 110  
 19  
 20 S.Ct. 1056, 1059 (1990). The Court reasoned that the term “the people” as used in Fourth  
 21  
 22 Amendment refers to a class of persons who are part of a national community or who have  
 23  
 24 otherwise developed sufficient connection with the United States to be considered part of  
 25  
 26 community. *Verdugo-Urquidez*, 494 U.S. at 266, 110 S.Ct. at 1061. However, *Verdugo* does not  
 27  
 28 apply in the instant case for several reasons.

29  
 30 First, the Supreme Court’s opinion in *Verdugo* makes no reference to the joint venture  
 31  
 32 doctrine. *United States v. Baboolal*, No. 05-CR-215, 2006 U.S. Dist. LEXIS 40645 at \*4 (E.D.  
 33  
 34 Wis. June 16, 2006). The facts in *Verdugo* concern a search initiated by and conducted primarily  
 35  
 36 by an actual United States agency. *Verdugo-Urquidez*, 494 U.S. at 262-263, 110 S.Ct. at 1059.  
 37  
 38 Cases where the joint venture doctrine is discussed as an issue concern the search and seizures of  
 39  
 40 foreign authorities as opposed to those of actual United States agencies. *See Stonehill v. United*  
 41  
 42 *States*, 405 F.2d 738 (9th Cir. 1968)(Philippine authorities); *United States v. Rose*, 570 F.2d  
 43  
 44 1358 (9th Cir. 1978)(Canadian Police); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir.

1 1984)(Columbian authorities); *United States v. Behety*, 32 F.3d 503 (11th Cir. 1994)(Guatemalan  
2  
3 Officials); *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995)(Danish and Italian authorities).

4  
5 This case, unlike *Verdugo*, concerns a search conducted by foreign authorities.

6  
7 Second, the *Verdugo* Court did not concern itself with the application of foreign law.  
8  
9 The joint venture doctrine requires courts to look to foreign law when determining whether a  
10  
11 search is reasonable. *See Barona*, 56 F.3d at 1094; *U.S. v. Peterson*, 812 F.2d 486, 490 (9th Cir.  
12  
13 1987).

14  
15 Finally, the actual holding of the case is inapplicable. The Court in *Verdugo* held that the  
16  
17 Fourth Amendment does not apply *to search and seizures by United States agents of property*  
18  
19 *that is owned by a nonresident alien and located in a foreign county.* *Id.* at 261, 110 S.Ct. at  
20  
21 1056(emphasis added). This motion does not concern suppressing items or information resulting  
22  
23 from a search or seizure conducted by United States, rather it concerns the RCMP.

24  
25 **b. Joint Venture**

26  
27 If American law enforcement officials participate in a foreign search, or if the foreign  
28  
29 authorities actually conducting the search were acting as agents for their American counterparts,  
30  
31 the exclusionary rule can be invoked. *Rose*, 570 F.2d at 1362(citing *United States v. Morrow*,  
32  
33 537 F.2d 120, 139 (5th Cir. 1976)). In *Peterson*, the Ninth Circuit held that the Fourth  
34  
35 Amendment was implicated due to the existence of a joint venture. In arriving at this conclusion,  
36  
37 the Ninth Circuit found relevant the fact that United States agents termed their actions a “joint  
38  
39 investigation,” treated the affair as one in which marijuana was destined for the United States,  
40  
41 were involved in translating and intercepting transmissions, and advised foreign authorities of  
42  
43 the relevance of information received by foreign authorities. *Peterson*, 812 F.2d at 490.  
44  
45  
46

1 Here, the Government has admitted this case is the result of a joint investigation.  
2  
3 Information provided in discovery shows that this joint investigation was a part of “Operation  
4  
5 Frozen Timber.” The investigation concerned RCMP gathering intelligence for ICE, ICE was  
6  
7 directing RCMP where to focus their efforts, and the RCMP were leaving the prosecution to U.S.  
8  
9 authorities. As a result of this joint investigation, the RCMP made contact with Rosenau on  
10  
11 September 21, 2005 and engaged in an unlawful search. The activities of the Canadian and U.S.  
12  
13 authorities went far beyond mere cooperation. Operation Frozen Timber and the joint  
14  
15 investigation of September 21, 2005 constitute a joint venture.

16  
17 **c. Violation of Canadian Law**

18 If a joint venture exists between United States and foreign officials, the law of the foreign  
19  
20 country must be consulted at the outset as part of the determination whether or not the search  
21  
22 was reasonable. *Peterson*, 812 F.2d at 490. Like the Fourth Amendment, Section Eight of the  
23  
24 Canadian Charter of Rights and Freedoms provides that “[e]veryone has the right to be secure  
25  
26 against unreasonable search or seizure.”

27  
28 Canadian search and seizure law roughly reflects that of the United States. An  
29  
30 assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or  
31  
32 seizure, must focus on its “reasonable” or “unreasonable” impact on the subject of the search or  
33  
34 the seizure. The guarantee protects a reasonable expectation of privacy. A reasonable expectation  
35  
36 of privacy is to be determined on the basis of the totality of the circumstances. If an accused  
37  
38 person establishes a reasonable expectation of privacy, the inquiry must then proceed to  
39  
40 determine whether the search was conducted in a reasonable manner. *R. v. Edwards*, [1996] 1  
41  
42 S.C.R. 126; *Hunter v. Southam Inc.*, 1984 CanLII 33 (S.C.C.), [1984] 2 S.C.R. 145.

1 The party seeking to justify a warrantless search must be required to rebut a presumption  
 2 of unreasonableness. *Hunter et al., v. Southam Inc.*, 1984 CanLII 33 (S.C.C.), [1984] 2 S.C.R.  
 3 145; *R. v. Golden*, 2001 S.C.C. 83 (CanLII), 2001 SCC 83 (CanLII), 2001 S.C.C. 83 (CanLII),  
 4 [2001] 3 S.C.R. 679, 2001 SCC 83, *R. v. Mann*, 2004 S.C.C. 52 (CanLII), 2004 S.C.C. 52  
 5 (CanLII). In order to rebut the presumption of unreasonableness, three things must be  
 6 established, namely (1) that the search was authorized by law, (2) that the law authorizing the  
 7 search was reasonable, and (3) that the manner in which the search was carried out was  
 8 reasonable. Only where these three criteria are met is the “presumption of unreasonableness”  
 9 rebutted: in all other cases, a warrantless search infringes s. 8 of the Charter. *R. v. Collins*, 1987  
 10 CanLII 84 (S.C.C.), 1987 CanLII 84 (S.C.C.), 1987 CanLII 84 (S.C.C.), [1987] 1 S.C.R. 265.

11 Here, on September 21, 2005, the RCMP entered properties leased by Rosenau without  
 12 consent. Thereafter a warrantless search was conducted. RCMP searched a helicopter owned by  
 13 Mr. Roseau without consent. Thereafter, RCMP removed keys from Mr. Rosenau’s pocket, took  
 14 his Blackberry, and searched a shop located on the premises. The RCMP had no probable cause  
 15 or legal justification to conduct these searches. The search and seizure was not authorized by  
 16 Canadian Law and the manner in which the search was carried out was not reasonable. The  
 17 search and seizure was in violation of the Section Eight of the Canadian Charter of Rights and  
 18 Freedoms and the Fourth Amendment by virtue of the joint venture doctrine. The Government  
 19 bears the burden of rebutting the presumption that the RCMP search and seizure was reasonable.

20 **d. No Good Faith Reliance**

21 If foreign law was not complied with, “the good faith exception to the exclusionary rule  
 22 becomes part of the analysis.” *Barona*, 56 F.3d at 1092-1093. The good faith exception to the  
 23 exclusionary rule announced in *Leon* applies to the foreign search. *Peterson*, 812 F.2d at 492.



1 The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the  
 2  
 3 prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a  
 4  
 5 search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.  
 6  
 7 *U.S. v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3420 (1984). Although, *Leon* speaks only in  
 8  
 9 terms of good faith reliance on a facially valid search warrant, its reasoning applies as well to  
 10  
 11 reliance on foreign law enforcement officers' representations that there has been compliance  
 12  
 13 with their own law. *Peterson*, 812 F.2d at 492 (reliance on wiretap's legality by United States  
 14  
 15 authorities participating in joint narcotics investigation was objectively reasonable where federal  
 16  
 17 officers sought, and received, assurances from high ranking Philippine law enforcement  
 18  
 19 authorities that all necessary authorization was being obtained, and thus evidence seized on basis  
 20  
 21 of wiretap information was admissible under good-faith exception to exclusionary rule).

22  
 23 Here, there is no evidence that United States law enforcement relied in good faith on a  
 24  
 25 warrant for the search of properties leased by Mr. Rosenau in Yale, Canada. Additionally, there  
 26  
 27 is no evidence that United States law enforcement sought assurances from Canadian authorities  
 28  
 29 that the search conducted by the RCMP was lawful. Finally, there is no evidence that Canadian  
 30  
 31 officials provided United States authorities with assurances that the search was lawful. In sum,  
 32  
 33 United States authorities did not act in reasonable reliance on representations made by Canadian  
 34  
 35 authorities that the search was lawful. As a result, the good faith exception does not apply to  
 36  
 37 circumvent application of the exclusionary rule.

## 38 II. JOINT VENTURE AND FIFTH AMENDMENT PROTECTION

39  
 40 The Fifth Amendment provides that "[n]o person shall...be compelled in any criminal  
 41  
 42 case to be a witness against himself." In order to protect this privilege, police officers must  
 43  
 44 inform a criminal suspect of his or her right to remain silent prior to any custodial interrogation,  
 45

1 the right to counsel, and the right to cease questioning if he or she requests the assistance of  
2 counsel. *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L.Ed.2d 694, 86 S.Ct. 1602, 1627 (1966).

3  
4  
5 The prosecution may not use statements, whether exculpatory or inculpatory, stemming from  
6  
7 custodial interrogation of defendant unless it demonstrates use of procedural safeguards effective  
8  
9 to secure privilege against self-incrimination. *Miranda*, 384 U.S. 436, 445, 86 S.Ct. 1602, 1612.

10  
11 United States law enforcement officials may not intentionally evade the requirements of  
12  
13 *Miranda* by purposefully delegating interrogation duties to foreign law enforcement officers and  
14  
15 then having the fruits of the interrogation admitted at trial in the United States. Two exceptions  
16  
17 have developed to the general rule that voluntary statements obtained by foreign officials during  
18  
19 a custodial interrogation without benefit of *Miranda* warnings are admissible. Namely, such  
20  
21 statements will not be admissible if obtained by foreign officials (1) engaged in a joint venture  
22  
23 with, or (2) acting as agents of, United States law enforcement officers. *United States v. Abu Ali*,  
24  
25 528 F.3d 210, 228 (4th Cir. 2008). When a joint venture exists, the failure of foreign authorities  
26  
27 to provide *Miranda* warnings to one subject to custodial interrogation requires suppression of  
28  
29 statements. *See U.S. v. Emery*, 591 F.2d 1266 (9th Cir. 1978)(joint venture existed between  
30  
31 United States and Mexican authorities such that statements given by one suspect while under  
32  
33 interrogation by Mexican authorities were subject to suppression for failure of such authorities to  
34  
35 administer *Miranda* warnings); *see also U.S. v. Covington*, 783 F.2d 1052, 1056 (9th Cir.  
36  
37 1985)(holding *Miranda* and *Edwards* apply to foreign officers acting as agents of United States  
38  
39 law enforcement).

40  
41 Here, a joint venture between United States authorities and Canadian authorities clearly  
42  
43 existed. Mr. Rosenau was detained by the RCMP for up to an hour. Mr. Rosenau was never free  
44  
45 to leave. During the detention, the RCMP subjected Mr. Rosenau to an interrogation. Mr.

1 Rosenau answered questions without ever being informed of his Miranda rights. As a result, the  
 2  
 3 statements made by Mr. Rosenau are not admissible pursuant to the Fifth Amendment and  
 4  
 5 *Miranda*.

### 6 7 CONCLUSION

8  
 9 A joint venture existed between United States and Canadian authorities in the above  
 10  
 11 matter. The existence of a joint venture triggered Fourth and Fifth Amendment protections. The  
 12  
 13 RCMP engaged in a warrantless search and seizure that was in violation of Section Eight of the  
 14  
 15 Canadian Charter of Rights and Freedoms. As a result, any fruits of this warrantless search and  
 16  
 17 seizure must be suppressed as required by the Fourth Amendment. In addition, Mr. Rosenau was  
 18  
 19 subject to a custodial interrogation by RCMP while engaged in a joint venture. Mr. Rosenau was  
 20  
 21 never informed of his *Miranda* rights. As a result, all statements made by Mr. Rosenau during  
 22  
 23 such custodial interrogation are inadmissible.

24  
 25 DATED this 6<sup>th</sup> day of September, 2011.

26  
 27 Respectfully submitted,  
 28 PLATT & BUESCHER

29  
 30  
 31 s/Craig Platt  
 32 Craig Platt  
 33 Attorney for Defendant  
 34 WSBA #12396  
 35 P.O. Box 727  
 36 Coupeville, Washington 98239-0727  
 37 Telephone: (360) 678-6777  
 38 Fax: (360) 678-0323  
 39 Email: craig@plattbuescher.com  
 40  
 41  
 42  
 43  
 44  
 45  
 46

CERTIFICATE OF SERVICE

I hereby certify that on 9/6/2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telephax.

s/Craig Platt  
Craig Platt  
Attorney for Defendant  
WSBA #12396  
P.O. Box 727  
Coupeville, Washington 98239-0727  
Telephone: (360) 678-6777  
Fax: (360) 678-0323  
Email: craig@plattbuescher.com